# Mohammad Ambree bin Yunos @ Unos v Public Prosecutor

HIGH COURT (KOTA KINABALU) — CRIMINAL MOTION NO BKI-44–6/5 OF 2022
LEONARD SHIM J
20 OCTOBER 2022

*Criminal Procedure — Bail — Non-bailable offence — Applicant charged with murder under s 302 of Penal Code — Whether there were reasonable grounds for believing applicant was guilty of the offence — Whether there were special circumstances for bail to be granted — Criminal Procedure Code ss 49, 388 & 388A*

The applicant and his wife had been preferred a tentative charge under s 302 of the Penal Code ('the PC') read together with s 34 of the PC at the magistrates' court. During the proceedings at the magistrates' court, the tentative charge was read to both the applicant and his wife, but no plea was taken from both of them. The applicant and his wife applied for bail respectively before the magistrate but was rejected and were ordered to be further remanded under s 259 of the Criminal Procedure Code ('the CPC'). The application by the applicant's wife was also dismissed by the High Court but was subsequently granted bail when her appeal was allowed by the Court of Appeal. Hence, this notice of motion by the applicant for bail under ss 49, 388 and 388A of the CPC for the following orders: (a) the applicant be granted bail pending disposal of the trial at the High Court on condition set by the court in order for him to attend court during the trial; (b) alternatively, with leave of this court, the applicant be released on bail and an electronic monitoring device be attached to him under on condition set by the court in order for him to attend court during the trial; and (c) such further order or other relief which this court deemed just and fit to grant.

**Held**, granting bail with conditions:

(1) The affidavit in opposition showed that no forensic or any other report had been exhibited. Neither did it contain any other documentary exhibit. Further, it did not mention or allude to the facts (whether brief or otherwise) of the case or offence which the applicant was alleged to have committed. There was insufficient material before the court to show that there were reasonable grounds to believe that the applicant had committed murder. Due to the lack of material or prima facie evidence on the alleged offence of murder provided by the prosecution in the affidavit in opposition, the court had hardly any information or material to hold that there were reasonable grounds for believing that the

applicant was guilty of the offence under s 302 of the PC. There was no evidence to show that the accused posed a flight risk. Neither was there any danger of the offence being continued or repeated. Further, no plea was taken from the applicant and his wife to the tentative charge and the case against them had yet to be transferred from the magistrates' court to the High Court after a lapse of ten months since the date of their arrest. There was no explanation for the long delay and failure to transfer the case against the applicant to the High Court despite the express and specific averment in the affidavit in opposition that 'the post mortem report is ready' and 'the case is ready to be transferred to the High Court' (see paras 33–34, 38 & 40–41).

(2) The absence of evidence of flight risk and tampering with evidence/witnesses, the lack of reasonable grounds for believing the applicant had committed the offence of murder he was charged with and the unexplained and inordinate delay in transferring the case to the High Court, constituted exceptional circumstances for the court to exercise its discretion to grant bail. The requirements of public interest could be satisfied by imposing suitable conditions in granting bail (see paras 42–43).

**[Bahasa Malaysia summary**

Pemohon dan isterinya telah didakwa dengan pertuduhan tentatif di bawah s 302 Kanun Keseksaan ('KK') yang dibaca bersama dengan s 34 KK di mahkamah majistret. Semasa prosiding di mahkamah majistret, pertuduhan tentatif dibacakan kepada kedua-dua pemohon dan isterinya, tetapi tiada pengakuan diambil daripada mereka berdua. Pemohon dan isterinya masing-masing memohon jaminan di hadapan majistret tetapi ditolak dan diperintahkan untuk direman selanjutnya di bawah s 259 Kanun Tatacara Jenayah ('KTJ'). Permohonan oleh isteri pemohon juga telah ditolak oleh Mahkamah Tinggi tetapi kemudiannya jaminan dibenarkan apabila rayuannya dibenarkan oleh Mahkamah Rayuan. Oleh itu, notis usul ini oleh pemohon untuk jaminan di bawah ss 49, 388 dan 388A KTJ untuk perintah berikut: (a) pemohon dibenarkan jaminan sementara menunggu penyelesaian perbicaraan di Mahkamah Tinggi dengan syarat yang ditetapkan oleh mahkamah dalam memerintahkan dia untuk menghadiri mahkamah semasa perbicaraan; (b) sebagai alternatif, dengan kebenaran mahkamah ini, pemohon dibebaskan dengan jaminan dan peranti pemantauan elektronik dilekatkan kepadanya di bawah syarat yang ditetapkan oleh mahkamah supaya dia hadir ke mahkamah semasa perbicaraan; dan (c) apa-apa perintah lanjut atau relif lain yang mahkamah ini anggap adil dan patut diberikan.

**Diputuskan**, membenarkan jaminan dengan syarat:

(1) Afidavit menentang menunjukkan bahawa tiada laporan forensik atau sebarang laporan lain telah diekshibitkan. Ia juga tidak mengandungi

sebarang ekshibit dokumentari lain. Selanjutnya, ia tidak menyebut atau merujuk kepada fakta (sama ada ringkas atau sebaliknya) kes atau kesalahan yang didakwa telah dilakukan oleh pemohon. Terdapat material yang tidak mencukupi di hadapan mahkamah untuk menunjukkan bahawa terdapat alasan yang munasabah untuk mempercayai bahawa pemohon telah melakukan pembunuhan. Disebabkan kekurangan material atau keterangan prima facie mengenai dakwaan kesalahan membunuh yang diberikan oleh pihak pendakwaan dalam afidavit menentang, mahkamah tidak mempunyai sebarang maklumat atau material untuk memutuskan bahawa terdapat alasan yang munasabah untuk mempercayai bahawa pemohon bersalah atas kesalahan di bawah s 302 KK. Tiada bukti menunjukkan bahawa tertuduh menimbulkan risiko pelarian. Juga tidak ada bahaya kesalahan itu diteruskan atau diulang. Tambahan pula, tiada pengakuan dibuat daripada pemohon dan isterinya terhadap pertuduhan tentatif dan kes terhadap mereka masih belum dipindahkan dari mahkamah majistret ke Mahkamah Tinggi selepas sepuluh bulan sejak tarikh mereka ditangkap. Tiada penjelasan mengenai kelewatan yang lama dan kegagalan untuk memindahkan kes terhadap pemohon ke Mahkamah Tinggi walaupun penegasan jelas dan khusus dalam afidavit menentang bahawa 'laporan bedah siasat sudah siap' dan 'kes sedia untuk dipindahkan ke Mahkamah Tinggi' (lihat perenggan 33–34, 38 & 40–41).

(2) Ketiadaan bukti risiko pelarian dan mengganggu bukti/saksi, kekurangan alasan munasabah untuk mempercayai pemohon telah melakukan kesalahan membunuh yang didakwa dan kelewatan yang tidak dapat dijelaskan dan melampau dalam memindahkan kes ke Mahkamah Tinggi, merupakan keadaan yang luar biasa untuk mahkamah menggunakan budi bicaranya untuk memberikan jaminan. Keperluan kepentingan awam boleh dipenuhi dengan mengenakan syarat yang sesuai dalam memberikan jaminan (lihat perenggan 42–43).]

**Cases referred to**

*Che Su binti Daud v PP* [1978] 2 MLJ 162, HC (refd)
*Hobalan a/l N Vello v PP* [2021] MLJU 3008; [2022] 1 CLJ 151, HC (refd)
*KS Menon, Re* [1946] 1 MLJ 49 (refd)
*Leong Poh Shee v Ng Kat Chong* [1966] 1 MLJ 86 (refd)
*Leow Nyok Chin v PP* [1999] 1 MLJ 437, HC (refd)
*Loy Chin Hei v PP* [1982] 1 MLJ 31; [1981] 1 MLRH 63; [1981] CLJ Rep 178 (refd)
*Moh Ting King v PP* [1995] 3 MLJ 461; [1996] 2 CLJ 325 (folld)
*Puan bt Saad v PP* [2020] MLJU 1880; [2020] MLRHU 1499, HC (refd)
*PP v Dato' Balwant Singh (No 1)* [2002] 4 MLJ 427; [2002] 1 MLRH 505, HC (folld)

*PP v Entiran a/l Durasamy and other cases* [2022] 8 MLJ 900; [2022] 1 MLRH 490, HC (refd)
*PP v Letchemy* [1967] 2 MLJ 79 (refd)
*PP v Wee Swee Siang* [1948] 1 MLJ 114; [1948] MLRH 90 (refd)
*Regina v Ooi Ah Kow* [1952] 1 MLJ 95 (refd)
*Saradamma And Ors, Re* AIR 1965 AP 444; 1965 CriLJ 709, HC (refd)
*Shanmugam v PP* [1971] 1 MLJ 283; [1971] 1 LNS 131 (folld)
*Tai Chai Keh v PP* [1948–1949] Supp MLJ 105b; [1948] 1 MLRA 241, CA (refd)
*The State v Shantilal & Ors* [1955] CriLJ 1205, HC (refd)
*VS Norti and Ors v State of Karnataka* ILR 1989 KAR 943, HC (refd)

**Legislation referred to**

Criminal Procedure Code ss 49, 259, 388, 388(1), 388A, First Schedule
Guardianship of Infants Act 1961 ss 5(1)
Guardianship of Infants Ordinance (Sabah Cap 54) ss 2, 5(1), (2)
Penal Code ss 34, 302

*Ram Singh (with Kimberly Ye) (Ram Singh Harbans & Co) for the applicant.*
*Mohammed Ali bin Imran (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.*

**Leonard Shim J:**

**[1]** This is a notice of motion by the applicant for bail under ss 49, 388 and 388A of the CPC. The orders sought are as follows:

(a) the applicant/accused be granted bail pending disposal of the trial at High Court, Kota Kinabalu on condition set by the court in order for him to attend court during the trial;

(b) alternatively, with leave of this court, the applicant/accused be released on bail and an electronic monitoring device be attached to him under s 388A of the Criminal Procedure Code (when it is in force) on condition set by the court in order for him to attend court during the trial; and

(c) such further order or other relief which this court deems just and fit to grant.

**[2]** The grounds of this application as stated (verbatim) in the affidavit in support (encl 2) are as follows:

(a) I verily state that the reasons that this application is made now is because my wife, Etiqah Siti Noorashikeen Mohd Sulong, who is also an accused in this case was allowed and released on bail by the Court of Appeal on 26 April 2022. My wife and I are still lawfully married;

(b) I was the one looking after the children while my wife was busy at work, considering the post she held at Petronas, Kota Kinabalu. Most of the time, I was the one looking after the children, took care for their daily needs from the moment they got up till bedtime. Of course, with the assistance of the maid (deceased) to do housework. I even shopped for groceries and prepared foods for the family;

(c) the maid only does the cleaning in our apartment. Normally I will send my wife to work before 8am and send my son to school, thereafter attend to my twin children. I will fetch my son from Taska in Kepayan at 2pm;

(d) before I fetched my wife from work, I bathe the children and I leave home at 4.30pm. My wife's routine is one week working from home and one week working in the office;

(e) I worked as a contractor and arranged my own timing and work schedules to suit the convenience of the family and also to cater the needs of the children;

(f) I wish to state that both my wife and I are still married and we both have equal rights in managing, care, custody and control of the children where at this moment they must be thinking about me who is still on remand, though they are able to be with their mother which is indeed good, but my presence with the family is essential too;

(g) I must say that I do miss them and guidance from me to keep the family going, particularly the young children is a paramount consideration;

(h) I have permanent address and home in Kota Kinabalu, Sabah and my family members who are having permanent job and address shall stand as sureties for me;

(i) I undertake not to abscond and there is no risk at all that I will do so, as my wife and young children are in Kota Kinabalu. I need them more than to jeopardise the family situation, including myself by now attending court till disposal of the trial; and

(j) I also wish to state that the applicant/accused's applications herein do not cause any prejudice to the prosecution, police authorities and/or the prison's authorities.

BRIEF FACTUAL BACKGROUND

**[3]** The applicant and his wife, Miss Etiqah Siti Noorashikeen Mohd Sulong ('the applicant's wife') have been preferred a tentative charge under s 302 of the Penal Code read together with s 34 of the Penal Code at the Magistrates' Court, Kota Kinabalu on 29 December 2021.

**[4]** The tentative charge against the applicant and his wife reads as follows:

Bahawa kamu bersama-sama, diantara 10 Disember 2021 hingga 13 Disember 2021 bertempat di alamat rumah Unit A-03-A, Tingkat 3, Amber Tower, Lido Avenue, Jalan Lintas, Lido, di dalam Daerah Penampang, di dalam Negeri Sabah, telah membunuh Nur Afiah Binti Daeng Damin (Kad Pengenalan: 930607-01-5884) umur 28 tahun, bangsa Bugis dan dengan itu, kamu telah melakukan suatu kesalahan di bawah seksyen 302 Kanun Keseksaan dan dibacakan bersama seksyen 34 Kanun Keseksaan.

HUKUMAN: Hendaklah diseksa dengan hukuman gantung sampai mati.

**[5]** During the proceedings at the magistrates' court, the learned deputy public prosecutor presented the tentative charge for murder (under s 302 of the Penal Code) and it was read to both the applicant and his wife, but no plea was taken from both of them.

**[6]** The applicant was represented by Messrs Ram Singh & Co, whilst the applicant's wife was represented by Messrs Rakhbir Singh & Co.

**[7]** On 29 December 2021, after the said tentative charge was read to both of the applicant and his wife, the applicant's defence counsels (Ram Singh together with Kimberly Ye) had applied for bail before the learned magistrate, Puan Jessica Ombou Kakayun. Similarly, the counsel for the applicant's wife (Rakhbir Singh) had applied for bail before the learned magistrate. However, the learned magistrate rejected both the accused's bail applications and were ordered to be further remanded under s 259 of the Criminal Procedure Code.

**[8]** For ease of reference, a brief chronology of events is stated in the table below:

| Date | Event | Court | Order by court | Reference |
|---|---|---|---|---|
| 21 December 2021 | The applicant and his wife were released on police bail. | – | – | See para 26 of encl No 2. |
| 29 December 2021 | The applicant and his wife appeared at the Magistrates' | Magistrates' Court, Kota Kinabalu. | No plea taken. No bail offered. Case adjourned to 10 February | See para 30 of encl No 2. |

| Date | Event | Court | Order by court | Reference |
|---|---|---|---|---|
| | Court, Kota Kinabalu and were tentatively charged under s 302 of the Penal Code read together with s 34 of the Penal Code. | | 2022 at 9am pending Chemist Report. | |
| 31 March 2022 | The applicant's wife's application was dismissed by the High Court, Kota Kinabalu. | High Court, Kota Kinabalu. | – | See para 34 of encl No 2. |
| 26 April 2022 | The applicant's wife's appeal (Criminal Appeal Case No S-05–191–04 of 2022) to the Court of Appeal, Putrajaya was allowed. | Court of Appeal, Putrajaya (by Zoom Video Conferencing) | Bail granted with RM30,000 with one local surety. Passport and travel documents to be surrendered to magistrates' court. To report to the Penampang police headquarters at noon every Monday. | See para 34 of encl No 2. |
| 17 May 2022 | Mention at Magistrates' Court, Kota Kinabalu. | – | Pending chemist report and other reports. | – |

THE LAW

**[9]** Section 388 of the Criminal Procedure Code ('the CPC') states as follows:

> 388 When person accused of non-bailable offence may be released on bail.
>
> (1) When any person accused of any non-bailable offence is arrested or detained without warrant by a police officer or appears or is brought before a Court, he may be released on bail by the officer in charge of the police district or by that Court, but he shall not be so released if there appears reasonable grounds for believing that he has been guilty of an offence punishable with death or imprisonment for life:
>
> Provided that the Court may direct that any person under the age of sixteen years or any woman or any sick or infirm person accused of such an offence be released on bail.
>
> (2) If it appears to such officer or Court at any stage of the investigation, inquiry or trial, as the case may be, that there are not reasonable grounds for believing that the accused has committed a non-bailable offence, but there are sufficient grounds for further inquiry into his guilt, the accused shall, pending such inquiry, be released on bail, or, at the discretion of that officer or Court, on the execution by him of a bond without sureties for his appearance as hereinafter provided.
>
> (3) An officer or a Court releasing any person on bail under subsection (1) or (2) shall record in writing the reasons for so doing.
>
> (4) If at any time after the conclusion of the trial of a person accused of a non-bailable offence and before judgment is delivered, the Court is of opinion that there are reasonable grounds for believing that the accused is not guilty of the offence, it shall release the accused, if he is in custody, on the execution by him of a bond without sureties for his appearance to hear judgment delivered.
>
> (5) Any Court may at any subsequent stage of any proceeding under this code cause any person who has been released under this section to be arrested and may commit him to custody.

**[10]** In *Loy Chin Hei v Public Prosecutor* [1982] 1 MLJ 31; [1981] 1 MLRH 63; [1981] CLJ Rep 178, Wan Yahya J stated:

> A *non-bailable offence* is no doubt an offence in respect of which the accused may be refused bail, but *it is not an absolutely* unbailable offence because the court has *been given the discretionary power to grant bail* in certain circumstances and, in the case of offences punishable with life imprisonment or death, for special reasons. (Emphasis added.)

**[11]** In *Public Prosecutor v Dato' Balwant Singh (No 1)* [2002] 4 MLJ 427; [2002] 1 MLRH 505 it was held:

> (1) The general principle underlying s 388(1) is that *bail may be granted at the discretion of the court in non-bailable offences.* A *qualification is* made in cases of *offences punishable with death or life imprisonment whereby bail shall not be granted* if there appear *reasonable grounds for believing that the accused is guilty of such offences.*

A Where there are *no reasonable grounds, bail may still be granted in such cases at the discretion of the court.* The restriction that has been imposed does not apply to the instances enumerated in the proviso to s 388(1) with the result that bail may be granted at the discretion of the court. (Emphasis added.)

B **[12]** Further, in *Dato' Balwant Singh*, it was also held:

(24) ... The *seriousness of the offence cannot be the dominant consideration. The fact that there are no reasonable grounds for believing that the accused is guilty of the offence charged will certainly be in his favour.* (Emphasis added.)

C

**[13]** The CPC does not specify the factors which the court must take into account before deciding whether or not to allow a person accused of a non-bailable offence to be released on bail. In *Public Prosecutor v Wee Swee Siang* [1948] 1 MLJ 114, Callow J set out the factors that the court must
D consider in deciding whether to admit the accused to bail.

There are set out in the Second Edn of Mallal's Criminal Procedure Code at p 377 nine points which the Court may take into consideration when granting or refusing bail; they are:

E (1) Whether there was or was not *reasonable ground for believing the accused guilty of the offence. (On this the Court was afforded no information. It could have been supplied by affidavit, R v Rutchinson ILR 53 All at p 938.*

(2) The nature and gravity of the offence charged. (Clearly the alleged offence is grave).

F (3) The severity and degree of punishment that might follow. (Extortion is receiving exemplary punishment; the maximum is three years imprisonment or fine or whipping, or any two of such punishments).

(4) The danger of the accused absconding if released on bail.

G (5) His character, means and standing.

(6) The danger of the offence being continued or repeated.

(7) The danger of the witnesses being tampered with.

H (8) Opportunity to the accused to prepare the defence.

(9) The long period of detention of the accused and probability of further period of delay. (Assuming the trial takes place on 23 as arranged, the period from arrest to trial will be ten days).

I CONTENTION OF THE PARTIES

**[14]** The applicant contends that there are special circumstances for bail to be granted and this issue is stated at paras 40–48 of encl No 2 under the subheading — grounds of this application.

**[15]** As stated above, the applicant as a father, has equal rights as much as the mother in care and management of the three children of the marriage.

**[16]** See s 5(1) of the Guardianship of Infants Act 1961 (Revised 1988) (though this Act is only applicable in Peninsular Malaysia only):

> (1) In relation to the custody or upbringing of an infant or the administration of any property belonging to or held in trust for an infant or the application of the income of any such property, a mother shall have the same rights and authority as the law allows to a father, and the rights and authority of mother and father shall be equal.
>
> (2) *The mother of an infant shall have the like powers of applying to the Court in respect of any matter affecting the infant as are possessed by the father.*

**[17]** On the other hand, more relevant and applicable in Sabah is the Guardianship of Infants Ordinance (Sabah Cap 54) under s 5(1) and (2):

> 5 Equality of parental rights.
>
> (1) In relation to the custody or upbringing of an infant or the administration of any property belonging to or held in trust for an infant or the application of the income of any such property, a mother shall have the same rights and authority as the law allows to a father, and the rights and authority of mother and father shall be equal.
>
> *(2) The mother of an infant shall have the like powers of applying to the Court in respect of any matter affecting the infant as are possessed by the father.*

**[18]** In our instant application, s 2 of Guardianship of Infants Ordinance (Sabah Cap 54), defines 'infant' to mean a person who has not attained the age of majority.

**[19]** The children involved here are between the ages of three to four years and require parental guidance.

**[20]** Reference is made to the High Court case of *Public Prosecutor v Entiran a/l Durasamy and other cases* [2022] 8 MLJ 900; [2022] 1 MLRH 490, whereby it was held by Su Tiang Joo JC, held (allowing the applications):

> (1) There was *no intelligible differentia as to why men should not be allowed bail when women were allowed bail under s 13(2)(b) of the SOSMA when charged for a security offence;* the security offence in this case being an offence under s 130V(1) of the Penal Code. *Such a blanket exception in favour of women was discriminatory against men. Women were as equally capable of committing security offences under the SOSMA as men. Such discrimination would not qualify as a rational or reasonable classification or differentiation. Indeed, to drive home the point, there was no provision at all in the SOSMA that women could not be charged for any security offences under this Act. The very fact that there was a provision for bail for women under s 13(2)(b) of the SOSMA would logically drive anyone to conclude that women were capable of committing security offences and were equally liable to be charged for the same.*

**[21]** As a matter of fact, this court may impose many conditions (similar to that of his wife's) on the accused person such as, surrendering his passport, reporting to the nearest police station ie IPD Penampang weekly, until disposal of his case.

**[22]** The applicant submits that the Court of Appeal in the wife's situation found that there was no flight risk on her, equally in the husband's (applicant) position, the prosecution ought not to have such fear on him.

**[23]** Further, since the tentative charge against both the wife and the husband (applicant) under s 302 of the Penal Code with common intention under s 34 of the Penal Code, both the accused persons (wife and husband) must be given an opportunity to discuss and strategize their defences against a serious charge, like in this case, a murder charge. Hence, the applicant submits that bail must be offered to the applicant too. See the High Court case of *Hobalan a/l N Vello v Public Prosecutor* [2021] MLJU 3008; [2022] 1 CLJ 151 on the issue of 'flight risk'.

**[24]** Reference is made by the applicant to the case of *Public Prosecutor v Dato' Balwant Singh (No 1)* [2002] 4 MLJ 427; [2002] 1 MLRH 505 it was held:

> ... It may not be in the public interest to grant bail to a person facing a murder charge. However, where the other factors favour an accused the requirements of public interest can be satisfied by imposing suitable conditions in granting bail. It is settled law that a court may impose conditions in granting bail (see *Public Prosecutor v Dato' Mat* [1991] 1 MLRA 213; [1991] 2 MLJ 186; [1991] 1 CLJ 385, *Public Prosecutor v Abdul Rahim Hj Ahmad & Ors* [1988] 3 MLJ 272; [1988] 3 MLRH 515). The exceptional circumstances of this case compelled me to conclude that the accused ought to be enlarged on bail subject to the imposition of certain conditions. I pause to add that the granting of bail in an offence of murder is not unprecedented. It has been done, for example, in the Indian case of *Niranjan Singh and Anor v Prabhakar Rajaram Kharote and Others* AIR [1980] 785, in the Australian cases of *R v Malone* [1903] St R Qd 140, *R v Vines* [1930] QWN 35 and *R v McDowell* [1954] QWN 47 and in the *Canadian* cases of *R v Stewart* [1946] 3 WWR 160 and *R v Hawken* [1944] 1 WWR 408.
>
> [27] In the upshot I ordered that the accused be enlarged on bail in the sum of RM500,000 with two sureties with security to be furnished. It is subject to acceptance of the following conditions:
>
> (i) the accused is to surrender his firearm and the licence relating thereto to the police immediately;
>
> (ii) all passports to be surrendered to the court;
>
> (iii) the accused is to report to the police once in two weeks;
>
> (iv) the accused is to remain indoors from the hours of 6pm to 8am;

(v) the accused is not to be present at any open public place or attend any public functions save for religious and family activities;

(vi) the accused is not to leave Kuala Lumpur and Petaling Jaya without leave of court;

(vii) the accused is to cease his legal practice within a period of one week from 8 August 2002.

**[25]** The applicant referred to the following authorities in support of this contentions:

(a) *Loy Chin Hei v Public Prosecutor* [1982] 1 MLJ 31; [1981] 1 MLRH 63; [1981] CLJ Rep 178;

(b) *Public Prosecutor v Dato' Balwant Singh (No 1)* [2002] 4 MLJ 427; [2002] 1 MLRH 505;

(c) *Tai Chai Keh v Public Prosecutor* [1948–1949] Supp MLJ 105b; [1948] 1 MLRA 241;

(d) *Public Prosecutor v Wee Swee Siang* [1948] 1 MLJ 114; [1948] MLRH 90;

(e) *Che Su Bte Daud v Public Prosecutor* [1978] 2 MLJ 162;

(f) *Public Prosecutor v Entiran a/l Durasamy and other cases* [2022] 8 MLJ 900; [2022] 1 MLRH 490;

(g) *Re Saradamma And Ors* AIR 1965 AP 444; 1965 CriLJ 709;

(h) *Hobalan a/l N Vello v Public Prosecutor* [2021] MLJU 3008; [2022] 1 CLJ 151;

(i) s 5(1) of the Guardianship of Infants Act 1961 (Revised 1988);

(j) s 5(1) and (2) of the Guardianship of Infants Ordinance (Sabah Cap 54);

(k) *Puan bt Saad v Public Prosecutor* [2020] MLJU 1880; [2020] MLRHU 1499; and

(l) *VS Norti and Ors v State of Karnataka* ILR 1989 KAR 943 on 9 February 1989.

**[26]** In summary, the prosecution the prosecution opposed this application based on the following reasons:

(a) nature and gravity of offence — the charge being an offence punishable with the death sentence is a serious one;

(b) the accused did not satisfy the test of special and exceptional circumstances;

(c) risk of witness tampering — there is a high likelihood of witness tampering since the witnesses involved are family members and neighbors of the accused;

(d) ability to prepare his defence — the accused's ability to prepare his defence is not impeded as his lawyers are able to meet him in prison/via video conferencing;

(e) no medical urgency — there is no medical urgency for the accused to be released on bail as he does not have a serious medical condition that requires special and urgent attention;

(f) reasonable grounds to believe that the accused is guilty of the offence; and

(g) health and well-being of the accused's children — there are other close family members who can take care of the applicant's children, and especially now that the wife is out on bail.

**[27]** The prosecution referred to the following cases in support of their arguments:

(a) *Public Prosecutor v Dato' Balwant Singh (No 1)* [2002] 4 MLJ 427; [2002] 1 MLRH 505;

(b) *Leow Nyok Chin v Public Prosecutor* [1999] 1 MLJ 437;

(c) *Public Prosecutor v Letchemy* [1967] 2 MLJ 79;

(d) *Re KS Menon* [1946] 1 MLJ 49;

(e) *Regina v Ooi Ah Kow* [1952] 1 MLJ 95;

(f) *The State v Shantilal & Ors* [1955] CriLJ 1205;

(g) *Leong Poh Shee v Ng Kat Chong* [1966] 1 MLJ 86; and

(h) *Hobalan a/l N Vello v Public Prosecutor* [2021] MLJU 3008; [2022] 1 CLJ 151

EVALUATION AND FINDINGS

**[28]** It is not disputed that the applicant and his wife, one Etiqah Siti Noorashikeen Mohd Sulong were tentatively charged for an offence under s 302 of the Penal Code which is a non-bailable offence by virtue of the First Schedule of the Criminal Procedure Code ('the CPC'). Although the offence of murder under s 302 is non-bailable, the decisions in *Loy Chin Hei* and *Balwant Singh* above shows that it is not an absolutely unbailable offence. As such, the court has discretion to grant bail. However, s 388(1) of the CPC provides a prohibition in cases of offences punishable with death or life imprisonment whereby bail shall not be granted if there appears reasonable grounds for

believing that the accused is guilty of such offences. A

**[29]** Information on whether there was or was not reasonable grounds for believing the applicant is guilty of the offence could and should have been provided by affidavit but unfortunately the prosecution have not done so for reasons unknown (see *Public Prosecutor v Wee Swee Siang* [1948] 1 MLJ 114). B

**[30]** Paragraphs 6–7 of the affidavit in opposition affirmed on 3 June 2022 (encl 13) and filed by the prosecution states as follows:

> 6. I would like to state that the case is ready to be transferred to the High Court, and that now the post mortem report is ready. C
>
> 7. I would also like to add that the delay is only so that when the case is transferred to the High Court, trial dates could immediately be fixed and there would be no further delay in obtaining additional documents or making further investigations. D

**[31]** However, no post mortem report was exhibited in encl 13 to indicate what is the actual cause or probable cause of death of the deceased. In their written submission, the prosecution contends that the deceased was beaten and tortured to death by the applicant and his wife. However, this bare contention was not asserted or alluded to in the affidavit in opposition affirmed by the investigating officer. E

**[32]** During the clarification of submissions on 21 July 2022, the prosecution submitted that there can be only one reason to release a person charged under s 302 on bail, ie there are no reasonable grounds to believe that he is guilty of an offence punishable with death. The prosecution contends that the affidavit in opposition reveals plenty of forensic evidence showing that there are reasonable grounds to believe that the applicant committed murder. Therefore, this is not a case where the prosecution is unwilling or unable to produce any material information or prima facie evidence to support their contention that there are reasonable grounds for believing that the applicant is guilty of the offence under s 302. In fact, the prosecution contends that they have provided such material or prima facie evidence in the affidavit in opposition (encl 13). F G H

**[33]** A careful scrutiny of the affidavit in opposition (encl 13) shows that no forensic or any other report have been exhibited. Neither does it contain any other documentary exhibit. Further, the affidavit in opposition (encl 13) affirmed by the investigating officer (Mohamad Salehuddin bin Arifin) does not mention or allude to the facts (whether brief or otherwise) of the case or offence which the applicant was alleged to have committed. It is undisputed that this application for bail was not made at an early stage. By now, nearly ten months have elapsed since the date of the applicant's arrest and investigations I

into the offence should have been carried out and/or completed. Although the prosecution is not required at this stage to prove that the applicant had committed the offence of murder beyond reasonable doubt, there must be sufficient material before the court to substantiate their contention that there are reasonable grounds to believe that the applicant has committed the offence he is being charged with (see *Che Su binti Daud v Public Prosecutor* [1978] 2 MLJ 162 (HC)).

**[34]** In the premises and based on the affidavit evidence, this court finds that there is insufficient material before the court to show that there are reasonable grounds to believe that the applicant have committed murder. Due to the lack of material or prima facie evidence on the alleged offence of murder provided by the prosecution in the affidavit in opposition, this court has hardly any information or material to hold that there are reasonable grounds for believing that the applicant is guilty of the offence under s 302 of the PC. As this matter before the court is an application for bail, this court has refrained from making any findings of fact on the commission of the offence at this stage.

**[35]** Although reasonable grounds for such belief has not been shown in the affidavit, it does not necessarily follow that bail will be given as of right. The court still has a discretion to grant bail or otherwise. See *Balwant Singh* above.

**[36]** It is trite that the main objective of bail is to ensure that the accused will attend court during trial and will not interfere or tamper with evidence or witnesses whilst on bail. In *Moh Ting King v Public Prosecutor* [1995] 3 MLJ 461; [1996] 2 CLJ 325, the High Court held:

> It is well settled that bail will not be withheld merely as a punishment and that the *requirements as to bail are to secure the attendance of an accused person at the trial — R v Rose* [1891] 67 LJQB 289; 7 Cox 717, CCA.
>
> In this case, the refusal of the Court below to grant bail for the reason given earlier is, in my view, justifiable in the circumstances. The prosecution spoke of the *likelihood of the accused intimidating the complainant* in this case and that itself would be a cogent ground for refusing bail. (Emphasis added.)

**[37]** In *Shanmugam v Public Prosecutor* [1971] 1 MLJ 283; [1971] 1 LNS 131, the court held:

> *What constitute exceptional and special reasons must necessarily depend on the facts of each case. One of the main considerations in granting bail is whether the accused, if released on bail, is likely to tamper with the prosecution evidence* or to get up false evidence in support of his defence. (Emphasis added.)

**[38]** It is undisputed that the accused's wife has been granted bail to look after her three children of tender years. The applicant is eager to reunite with

his wife who suffered from anxiety and depression after giving birth to their twin daughters and to take care of his wife and young children. One of his children suffers from autism. Hence, the likelihood of the applicant absconding is low or very unlikely. There is no evidence to show that the accused posed a flight risk. Neither is there any danger of the offence being continued or repeated.

**[39]** The prosecution contends that there is a high likelihood of witness tampering since the witnesses involved are family members and neighbours. This application for bail was made about six months after the date of the applicant's arrest. By now, nearly ten months had lapsed since the applicant's arrest and the police would have sufficient time to complete their investigation involving potential witnesses. The investigating officer had on 3 June 2022 affirmed that the post mortem report is ready and the case is ready to be transferred to the High Court. Apart from merely stating that the applicant was highly uncooperative with the police investigation team during the period that he was out on police bail, there is no evidence or averment in the affidavit in opposition to show that he would tamper with witnesses if released on bail.

**[40]** Further, it is undisputed that no plea was taken from the applicant and his wife to the tentative charge and the case against them has yet to be transferred from the magistrates' court to the High Court until today after a lapse of ten months since the date of their arrest. This is in stark contrast with the averment in the affidavit in opposition affirmed on 3 June 2022 which states that the case is ready to be transferred to the High Court now that the post mortem report is ready.

**[41]** During the hearing for clarification of submissions on 21 July 2022, the prosecution informed this court that it is just a matter of waiting for the mention before the magistrates' court fixed on 18 August 2022 to transfer the case against the applicant and his wife for the alleged commission of an offence under s 302 to the High Court. The notes of proceedings of the magistrates' court shows that during the mention before the learned magistrate on 18 August 2022 and 3 October 2022, no application was made by the Prosecution to transfer the case against the applicant and his wife to the High Court. There is no explanation for the long delay and failure to transfer the case against the applicant to the High Court despite the express and specific averment by the investigating officer in the affidavit in opposition on 3 June 2022 that 'the post mortem report is ready' and 'the case is ready to be transferred to the High Court'.

A CONCLUSION

B **[42]** In the absence of evidence of flight risk and tampering with evidence/witnesses and the lack of reasonable grounds being shown for believing the applicant had committed the offence of murder he is charged with and having regard to the unexplained and inordinate delay in transferring the case against the applicant and/or his wife to the High Court, this court finds that this constitute exceptional circumstances for the court to exercise its discretion to grant bail. See *Shanmugam v Public Prosecutor* above. Although the offence of murder is very grave, the seriousness of the offence is not the C dominant factor. It must be balanced against the failure of the prosecution to show that there are reasonable grounds for believing that the applicant had committed such offence. See *Balwant Singh* and *Hobalan N Vello* above.

D **[43]** Whilst it may not be in the public interest to grant bail to a person facing a murder charge, the factors highlighted in para 42 above operates favorably towards the applicant and this court finds that the requirements of public interest can be satisfied by imposing suitable conditions in granting bail.

E **[44]** Based on the aforesaid reasons and applying the principles enunciated by the court in *Moh Ting King*, *Shanmugam* and *Balwant Singh* above, bail is granted on the following conditions:

(a) the bail sum of RM30,000 (RM10,000 to be deposited in court) with two local sureties who are his family members with a permanent job and F permanent address in Sabah;

(b) passport and travel documents to be surrendered to the magistrates' court;

(c) no inter-state travelling without leave of court;

G (d) to report to the Penampang Police Headquarters at noon every Monday;

(e) not to approach or interfere with any of the witnesses; and

(f) an electronic monitoring device to be attached to the applicant in the magistrates' court or the appropriate court under s 388A of the Criminal H Procedure Code (when it is in force).

*Bail granted with conditions.*

I Reported by Nabilah Syahida Abdullah Salleh